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Office of Administrative Law Judges
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Issue Date: 14 November 2006

CASE NO: 2005-BLA-5508

In the Matter of:

B.J.,
Claimant,

v.

ELKINS ENERGY CORPORATION,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

Andrew Delph, Esq.
For Claimant

Joseph W. Bowman, Esq.
For the Employer

BEFORE: STEPHEN L. PURCELL
Administrative Law Judge

DECISION AND ORDER — DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. § 901 *et seq.* Under the Act, benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis also may recover benefits. Pneumoconiosis, commonly known as black lung, is defined in the Act as "a chronic dust disease of the lung and its sequelae, including pulmonary and respiratory impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

On January 26, 2005, this case was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held in Abingdon, Virginia on January 11, 2006. The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. They also are based upon my observation of the appearance and demeanor of the witness who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit received into evidence has been reviewed carefully, particularly those related to the Claimant's medical condition. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to "DX," "EX," and "CX" refer to the exhibits of the Director, Employer, and Claimant, respectively. The transcript of the hearing is cited as "Tr." and by page number.

Director's exhibits 1 through 47; Claimant's exhibits 1 through 5; and Employer's exhibits 1 through 6 were admitted into evidence pursuant to 20 C.F.R. § 725.456.[1] (Tr. 12-21).

The issues and facts being discussed in this opinion are those which have been raised by the parties. All other legal and factual contentions are considered abandoned.

ISSUES

The following issues remain for resolution:

1. Whether the claim was timely filed;

2. The length of Claimant's coal mine employment;

3. Whether Employer is the proper Responsible Operator in this case;

4. Whether Claimant has pneumoconiosis as defined by the Act and regulations;

5. Whether Claimant's pneumoconiosis arose out of coal mine employment;

6. Whether Claimant is totally disabled; and

7. Whether Claimant's disability is due to pneumoconiosis.

[1] The record was left open post-hearing for the Employer to respond to Claimant's evidence and, in particular, to submit the completed deposition of Dr. Gregory J. Fino, which has been admitted and designated as Employer exhibit 6. Employer and Claimant were also given the opportunity to submit written closing argument. Claimant's closing brief was received on May 11, 2006. No brief was filed by Employer, and the record is now closed.

The employer also raises the issues of whether the new regulations are constitutional and whether they violate the Administrative Procedure Act. These challenges are beyond the authority of an administrative law judge, but are noted and preserved for appeal.

(DX 34; Tr. 11-16).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

The claimant, B.J., was born September 6, 1947. (DX 2; DX 31). He married D.S.G. in May of 1969 and they are still married, living in Virginia. (DX 2; DX; 9; DX 31). They have no dependents at this time. (DX 31).

Claimant testified that he now has trouble breathing and has been on oxygen since July of 2004. (Tr. 25). Claimant has also been on several breathing medications for several years which were prescribed by his pulmonary physician, Dr. Emory H. Robinette. This doctor told Claimant he had black lung disease and emphysema, but Claimant does not recall being told that he was totally disabled due to black lung disease. (DX 31; Tr. 31). Claimant testified that he has seen Dr. Robinette for his breathing problems since 1991 or 1992. (Tr. 26). Dr. Ratliff is his family doctor, who treats him for illnesses other than his respiratory disease. Claimant quit working in the mines in 1991 after he became disabled from an auto accident that caused a ruptured disc in his back. (DX 31). He had back surgery to correct this problem, and is no longer being treated for this injury. Claimant testified that he smoked from age 18 until 1997 at an average rate of one pack of cigarettes per day. (DX 31; Tr. 27). At times, claimant would smoke up to 1½ packs per day. Claimant believes that his lung problems, but not his back problem, would prevent him from returning to his coal mine work. (DX 31).

Claimant filed his application for black lung benefits on February 22, 2001. (DX 2). A Proposed Decision and Order was issued on June 30, 2004, awarding benefits. (DX 32). However, this Decision was later revised to a denial of benefits after the District Director admitted that he had inadvertently failed to consider the Employer's medical evidence. (DX 34). In this Revised Proposed Decision, the District Director also explained that Elkins Energy was properly named as the Responsible Operator notwithstanding Claimant's work history for two other mining operations subsequent to his employment at Elkins. The District Director found a total of 16.59 years of qualifying coal mine employment. The claim was denied because Claimant had not shown the existence of pneumoconiosis or that his respiratory disease was caused, in part, by coal mine work. Moreover, Claimant did not show that he was totally disabled due to pneumoconiosis. After issuing this Proposed Decision, the District Director allowed Claimant the opportunity to respond to the Employer's medical evidence, specifically the medical examination report by Dr. Fino. (DX 41; DX 43). However, Claimant's additional evidence did not change the District Director's proposal to deny benefits. (DX 44). Pursuant to Claimant's request, the case was transferred to the Office of Administrative Law Judges for a formal hearing, on January 26, 2005. (DX 36; DX 45).

Timeliness of Claim

The Employer contests the timeliness of this claim on the basis that it was not filed within three years of Claimant being informed that he was disabled due to pneumoconiosis, as required under the regulations. 20 C.F.R. §725.308. The claim was filed in February 2001.

The Employer has never presented an argument, either at the hearing or post-hearing, to support this challenge. Nevertheless, the record contains no evidence that the miner has ever been told by a physician or understood that he was disabled due to pneumoconiosis before February 1998. Claimant testified that Dr. Robinette had informed him he suffered from black lung and emphysema, but he also testified that he did not recall ever being told he was disabled by black lung. Therefore, the evidence does not meet the Employer's burden of proving that this information was ever actually communicated to and understood by the miner within three years of filing his claim. In fact, there is no proven date when the miner has truly become aware that he has a "viable claim for benefits." *See Adkins v. Donaldson Mining Co.*, 19 BLR 1-34 (1993); *Cabral v. Eastern Assoc. Coal Corp.*, 18 BLR 1-25 (1993). Thus, Employer cannot show that the three-year statute commenced prior to the filing of this claim in 2001.

Proper Responsible Operator

In a Notice filed prior to the hearing, Counsel for Elkins Energy Corporation argued that Elkins is not the proper responsible operator on the basis that Claimant was subsequently employed for cumulative periods of at least one year by other operators, specifically D&J Trucking Co., Inc., D&J Trucking Co., Cary D. Justice, Double J Trucking, Jess H. Davis and/or Double J Trucking, Inc. The record shows that Claimant worked for Elkins Energy from 1997 through 1981 and worked for these other named entities at various times and years from 1983 through 1991. Counsel further stated that Claimant did not work for Elkins for a cumulative period of at least one year.

An operator may be considered a "potentially liable operator" if: 1) the operator was an operator for any period after June 30, 1973; 2) the miner was employed by the operator for a cumulative period of not less than one year; 3) the miner's employment with the operator included at least one working day after December 31, 1969; and 4) the operator is capable of assuming its liability for the payment of continuing benefits. 20 C.F.R. § 725.494(b-e).

The record is clear that Elkins was an "operator" after June 30, 1973; that the miner was employed by the operator for a cumulative period of not less than one year;[2] and that the miner's employment with the operator included at least one working day after December 31, 1968. (DX 3; DX 4; DX 7; DX 31). As the District Director accurately and thoroughly explained, the entities for whom Claimant worked after leaving Elkins in 1981 had no insurance as of 1991 and are not financially capable of assuming liability for this claim as required under 20 C.F.R. § 725.494(e)(1-3). The record contains all of the investigative correspondence with those

[2] The exact number of years will be discussed in the following section in determining Claimant's total length of qualifying coal mine employment. As will be explained, below, the individuals who owned and operated Elkins Energy, for whom Claimant worked from 1977 through 1981, also owned Elkins Coal and other operators for whom Claimant worked from 1970 through 1977.

subsequent coal mine entities, supporting the Director's determination surrounding their lack of ability to assume liability for this claim. (DX 17). Moreover, the District Director's research reveals that the other coal mining entities for which Claimant worked after Elkins were actually owned and operated by the same Elkins family. It was established, therefore, that Elkins Energy was the last coal mine operator that met all of the criteria for being a "potentially liable operator" under 20 C.F.R. § 725.494. Therefore, Elkins was properly named as the Responsible Operator for this claim, pursuant to 20 C.F.R. § 725.495(a)(3).

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant alleged 21 years of coal mine work on his application for benefits and alleged "20 to 21 years" at the hearing, with seven or eight of those years underground. (DX 2; Tr. 23). On his Employment History form accompanying his application, Claimant listed each coal mine employer along with the dates he worked for each company, and these periods of employment add up to about 18 years. (DX 3).

The District Director's research revealed that the Elkins family members owned Elkins Energy, as well as Elkins Coal, Rhonda Lou Energy Corporation, Dale Energy and Little John Coal, entities for which Claimant worked from 1969 through 1981. (DX 2; DX 3; DX 4; DX 7; DX 17; DX 31; Tr. 29-30). The Social Security Earnings Statement of record supports Claimant's testimony, as do the application and employment history forms of record that show employment with all of these entities during that period of time. However, the Earnings Statement also reveals that Claimant did not work in coal mining for three quarters in 1969 and the first three quarters in 1970. Therefore, I credit Claimant with 10½ years of mining from 1969 through 1981.

Claimant testified and the record shows that he next worked in mining from 1983 through 1985 for D&J Trucking. I credit Claimant for three full years of coal mining during that time.

Claimant's testimony and written statements show that he next worked for Al Blevins in 1986 and 1987 and for Double J Trucking in 1987, hauling coal. However, Claimant testified in a deposition that he only worked for Blevins about 1½ months and the Earnings Statement reflects this substantial reduction in wages that year. (DX 31). Therefore, I credit him with working for .2 years at Blevins in 1986 and for one year while at Blevins and for Double J Trucking in 1987, for a total of 1.2 years during 1986 and 1987.

Finally, the Earnings Statement supports Claimant's testimony and written forms that he worked for Double J Trucking and was a self-employed driver hauling coal from 1988 through 1991 when he quit working because of his trucking accident. Therefore, I credit Claimant with four years of coal mining during that time.

Adding these periods, I find that Claimant has shown he worked in qualifying coal mine employment for a total of 18.7 years.

The miner's last coal mining employment involved driving a coal truck, hauling coal from the mine sites to the tipple. (DX 5). According to Claimant's testimony, the most physical part of this job was "tarping" the truck and changing flat tires. (Tr. 24). Claimant would also perform routine maintenance on the trucks he drove, but he loaded and unloaded coal using levers with no manual lifting or manual loading involved. (DX 31).

MEDICAL EVIDENCE

A claim filed after January 19, 2001, is subject to the revised regulations of Part 718 and 725. The revised regulations impose two requirements on the submission of medical evidence. Initially, they require that the evidence be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. See 20 C.F.R. §§ 718.101 to 718.107. Secondly, the medical evidence must comply with the limitations of Sections 725.414, 725.456, 725.457, and 725.458. Regarding initial evidence offered in support of entitlement to benefits, the regulations provide that claimants and responsible operators are limited to the submission of no more than two chest x-ray interpretations, two pulmonary function tests, two arterial blood gas studies, two medical reports, one report of each biopsy and one autopsy report. 20 C.F.R. §§ 725.414(a)(2)(i) and (3)(i). In addition, the regulations caution that x-ray interpretations, pulmonary function studies, arterial blood gas studies, autopsy or biopsy reports, and physician opinions contained in a medical report "must each be admissible" under Sections 725.414(a)(2)(i), (3)(i) or (a)(4).

The regulations also provide limitations on medical evidence submitted in rebuttal of the opposing party's evidence. 20 C.F.R. § 725.414(a)(2)(ii) and (3)(ii). Each party may submit no more than one physician interpretation of each chest x-ray, pulmonary function study, arterial blood gas study, and autopsy or biopsy report submitted by the opposing party. 20 C.F.R. § 725.414(a)(2)(ii) and (3)(ii). A party may submit evidence rehabilitative of the evidence rebutted by the opposing party. The party is permitted to submit one "additional statement from the physician who originally interpreted the chest x-ray or administered the objective testing," or "from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." 20 C.F.R. § 725.414(a)(2)(ii) and (3)(ii).

Neither party objected under § 725.414 to the admission of the proffered evidence. After a review of the medical evidence included in the record, I find no violations of the evidentiary limitations.

1. X-rays

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 11	5/29/01	6/12/01	Patel/B, BCR[3]	0/0. Mild COPD.

[3] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. *See* 42 C.F.R. § 37.51(b)(2). Interpretations by a physician who is a "B" reader and is certified by the American Board of Radiology (designated on the chart as "BCR") may be given greater evidentiary weight than an interpretation by any other reader. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir.

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 11	5/29/01	5/29/01	Navani/B, BCR	Quality reading only. Quality "1"
DX 13	5/29/01	12/19/01	Wheeler/B, BCR	0/0
DX 12	5/29/01	4/21/04	Alexander/B, BCR	1/1
DX 15	1/25/02	4/12/02	Fino/B	0/0
EX 1	6/7/05	6/7/05	Castle/B	0/0

2. Pulmonary Function Studies[4]

Exhibit/ Date	Physician	Age/ Height	FEV1	FVC	MVV	FEV1 /FVC	Tracings	Comments
DX 41 3/3/00	Robinette	52/67"	1.06 1.30*	2.49 2.84*	-- --	43% 46%*	Yes	Good effort/ cooperation
DX 11 5/29/01[5]	Rasmussen	53/68"[6]	1.26 1.19*	2.15 3.43*	43 46*	40% 35%*	Yes	Good cooperation/ understanding
DX 15 1/12/02	Fino	54/68.5"	.98 1.00*	3.01 2.98*	-- --	43% 46%*	Yes	Good effort/ cooperation
EX 1 6/7/05	Castle	57/69"	.54 .78*	1.60 2.24*	27 --	34% 35%*	Yes	Acceptable/ reproducible

*After bronchodilator administered

1993); *Herald v. Director, OWCP*, BRB No. 94-2354 BLA (Mar. 23, 1995)(unpublished). When evaluating interpretations of miners' chest x-rays, an administrative law judge may assign greater evidentiary weight to readings of physicians with superior qualifications. 20 C.F.R. § 718.202(a)(1); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985). The Benefits Review Board and the United States Court of Appeals for the Sixth Circuit have approved attributing more weight to interpretations of "B" readers because of their expertise in x-ray classification. *See Warmus v. Pittsburgh & Midway Coal Mining Co.*, 839 F.2d 257, 261 n.4 (6th Cir. 1988); *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773, 1-776 (1984). The Board has held that it is also proper to credit the interpretation of a dually qualified physician over the interpretation of a B-reader. *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). *See also Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985) (weighing evidence under Part 718).

[4] Although the record contains another pulmonary function study ordered by Dr. Robinette in 1997 (DX 41), this report was not designated by Claimant as supporting his claim and the study would exceed the regulatory limitations.

[5] Dr. Michos validated the study dated 5/29/01 as "acceptable" except for "suboptimal MVV performance."

[6] As there is a discrepancy in the measured heights among the pulmonary function studies, I must make a finding resolving that discrepancy. *Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). There is no measured height that represents a majority finding by the testers. Therefore, I shall average the heights. An average results in a height of 68.13 inches. Thus, I find Claimant's height to be 68.13 inches.

3. Arterial Blood Gas Studies[7]

Exhibit	Date	pCO2	pO2	Resting/ Exercise
DX 11 Rasmussen	5/29/01[8]	39 41	61 51	Resting After Exercise
DX 15 Fino	1/25/02	38.1	69.6	Resting
EX 1 Castle	6/7/05	40.3	73.1	Resting

4. Narrative Medical Evidence

Dr. D.L. Rasmussen examined Claimant on May 29, 2001 at the request of the Department of Labor. (DX 11). Based on this physician's examination, the patient's symptoms, medical history, family history, a coal mining history of 21 years, x-ray, pulmonary function study, blood gas study, EKG, SBLLCO, and a history of smoking cigarettes for 28 years at the rate of 1½ packs of cigarettes per day, Dr. Rasmussen diagnosed chronic obstructive pulmonary disease and emphysema due to coal mine dust and cigarette smoking. This physician found a "marked loss of lung function" and did not believe Claimant could perform his last regular coal mine job because of his coal dust exposure combined with his smoking history. Dr. Rasmussen stated that the patient's coal dust exposure was a "significant contributing factor" to his impairment. The record shows that Dr. Rasmussen is board-certified in Forensic Medicine and is a B-reader.

Dr. Robinette, whose credentials are not of record, has treated Claimant for his breathing problems since about the mid-1990's. The record contains several reports and progress notes authored by Dr. Robinette. In a letter dated May 19, 1997, Dr. Robinette stated that, based on symptoms and Claimant's medical history, along with a 21-year coal mining history, Claimant was unable to work because of his pulmonary disease alone. (CX 5). At that time, Dr. Robinette's impression was simple coal workers' pneumoconiosis category 1/1, "very severe" obstructive lung disease with underlying emphysema, mild resting hypoxemia and degenerative arthritis with a history of low back pain. Dr. Robinette added:

> It is acknowledged that his smoking has contributed to his pulmonary disease but in my opinion the coal dust reticulation and emphysematous change has additionally contributed to his impaired diffusion capacity as well as his airflow obstruction.

Dr. Robinette did not report or describe the length of Claimant's smoking history, but in April of 1997, he noted an elevated carboxyhemoglobin level. (CX 5).

[7] The record contains other blood gas studies ordered by Dr. Robinette and other physicians during Claimant's hospitalizations in 1997, 2000 and 2002. However, these studies were not designated by Claimant as supporting evidence and, thus, will not be considered.

[8] Dr. Michos validated the test dated 5/29/01.

There is no record of Dr. Robinette examining or treating Claimant again until February of 2000 when he reassessed Claimant's pulmonary condition. (CX 5). The doctor then recognized a smoking history of 25 pack years and diagnosed obstructive lung disease with "underlying black lung disease," interstitial fibrosis, emphysema and "impairment of the diffusion capacity." He also listed Claimant's arthritis and "benign prostatic hypertrophy." In March of 2000, Claimant returned to review other studies ordered by Dr. Robinette, including a CT scan of the lungs. This scan revealed "minimal interstitial fibrosis with increasing interstitial markings present" and "evidence of centrilobular emphysema." This CT scan report did not mention pneumoconiosis or any disease due to coal dust exposure, but more testing was ordered. In April of 2000, Dr. Robinette determined that there was "no need for a lung transplant" and prescribed medication for Claimant's pulmonary problems. In July, Dr. Robinette noted that Claimant was "doing better" with a favorable response to medication and in October of 2000, diagnosed "chronic bronchitis." From October of 2000 through December of 2003, Dr. Robinette saw Claimant about nine times, consistently diagnosing shortness of breath, COPD, chronic bronchitis and airflow obstruction. In November of 2001, Dr. Robinette noted that an x-ray was to be interpreted for the existence of pneumoconiosis and forwarded to Claimant's attorney. The doctor then noted that Claimant showed him a letter stating that he does have black lung disease. Dr. Robinette then concluded from this visit that Claimant was disabled and that the disability was "at least partially attributable" to Claimant's previous coal mine employment. (CX 5). In May of 2002, Dr. Robinette made note of an "underlying coal workers' pneumoconiosis with chronic airflow obstruction and a history of prostate carcinoma." The record shows that Claimant had surgery in 2002 for prostate cancer. (DX 41). The discharge report by the surgeon, Dr. Naum Spiegel, listed prostate cancer and COPD. (DX 41). Reports during this time also described an elevated carboxyhemoglobin level and severe obstructive lung disease. In 2002, Dr. Robinette noted the existence of "complicated pneumoconiosis," but provided no basis or testing to explain this diagnosis. Claimant's medication therapy was continued in 2002 and 2003.

In 2004, Dr. Casey McReynolds and Dr. Richard Mullens, radiologists associated with Johnston Memorial Hospital, described "normal pulmonary function studies," and "pulmonary hyperinflation consistent with obstructive pulmonary disease" as a result of their "black lung evaluation." (CX 4). Further, a CT scan in May of 2005 revealed "no evidence of interstitial lung disease." (CX 4). This scan did show panlobular emphysema.

In July of 2005, Claimant visited Dr. Robinette, who prescribed oxygen on a 24-hour basis and continued all of the patient's "base" medications. (CX 2). The doctor listed the conditions of coal workers' pneumoconiosis, very severe obstructive lung disease with resting hypoxemia, and a history of prostatic carcinoma. Dr. Robinette added that the pulmonary disease was so severe that Claimant was "unable to work as an underground coal miner" and was "totally disabled." Dr. Robinette completed another follow-up report in November of 2005, noting the patient's "underlying interstitial lung disease, pneumoconiosis, panlobular emphysema, severe airflow obstruction and reduction of his diffusion capacity." (CX 1). At that time, Dr. Robinette continued the patient on oxygen and all medications. He concluded that Claimant was "obviously profoundly disabled from working as an underground coal miner" and required supplemental oxygen "24 hours per day, 7 days a week."

On January 25, 2002, Claimant was examined by Dr. Gregory J. Fino, who is board-certified in pulmonary disease and a B-reader. (DX 15). Based on a smoking history of 33 years at the rate of one pack of cigarettes per day, a coal mining history of 13 years underground and leaving the mines as a truck driver, medical and family histories, physical examination, x-ray, pulmonary function study, blood gas study, and all other objective tests of record, Dr. Fino concluded that there was insufficient objective medical evidence to justify a diagnosis of simple coal workers' pneumoconiosis or any "occupationally acquired pulmonary condition." Dr. Fino recognized that Claimant's pulmonary impairment was disabling and prevented him from returning to his last mining job or job requiring similar physical effort. However, Dr. Fino did not believe that Claimant had either legal or medical pneumoconiosis. In March of 2006, Dr. Fino was deposed concerning his examination. (EX 6). At that time, Dr. Fino provided additional detailed information about his own background and training and added that he had also reviewed Dr. Castle's report since his last written report in 2002. Dr. Fino described Claimant's last coal mining duties, the Claimant's smoking history and Claimant's history of his ruptured disc from the auto accident in 1997. The doctor noted that Claimant's carboxyhemoglobin level was no longer elevated at the time of his most recent examination of record. This specialist repeated his belief that Claimant did not have pneumoconiosis, but he found that the evidence did show emphysema. Dr. Fino then explained, in detail, his method for determining the difference between emphysema and other abnormalities, such as pneumoconiosis, by his review of the x-rays, CT scans and pulmonary function study values. This doctor repeated his statement made in his written report that Claimant's disability was due to a severe obstructive impairment that arose from his history of cigarette smoking, and that his disease was "no way related to coal mine dust exposure." Lastly, Dr. Fino noted that the pulmonary function study values he obtained were similar to those obtained by Dr. Castle, showing that Claimant's total lung volume was not reduced.

Dr. James R. Castle, who is also a board-certified pulmonary specialist and B-reader, examined Claimant on June 7, 2005. (EX 1). This doctor based his conclusions on Claimant's symptoms, family and medical histories, a coal mining history of 21 years, last working as a coal truck driver, the doctor's physical examination, x-ray, pulmonary function study, blood gas study, and EKG. Dr. Castle's assessment was as follows:

1. No evidence of coal workers' pneumoconiosis by physical examination, radiographic evaluation, and physiologic testing.
2. Severe obstructive airways disease with a marked response to bronchodilators associated with hyperinflation and gas trapping due to tobacco smoking and probable bronchial asthma.
3. History of prostrate cancer.

In arriving at his diagnoses, Dr. Castle also reviewed all other medical notes and test results of record, including those by Drs. Robinette, Rasmussen and Fino, and the notes from Johnson Memorial Hospital. Dr. Castle found "absolutely no evidence to indicate any form of pneumoconiosis including complicated pneumoconiosis." This specialist recognized the several "risk factors" in Claimant's case, including coal mining, tobacco abuse and bronchial asthma. He also recognized that Claimant is totally disabled, from a pulmonary standpoint, an unable to perform his previous coal mine duties. However, Dr. Castle unequivocally believed that

Claimant's disability was due to his tobacco abuse which caused Claimant's airway obstruction, in combination with a "significant asthmatic component." Dr. Castle was deposed on January 6, 2006. (EX 5). At that time, Dr. Castle explained that since his written report in June of 2005, he had the opportunity to review additional notes generated by Dr. Robinette in 2005 and additional CT scan interpretations by Drs. Wheeler, Scaterige and Scott. In this deposition, Dr. Castle repeated his finding of no pneumoconiosis and the existence of emphysema in the patient, based on the abnormal pulmonary function study results. He also noted that the last abnormal carboxyhemoglobin test was in 1997, indicating the high probability that Claimant had quit smoking since that time. Dr. Castle did not change his opinion, based on the old and new evidence, that Claimant's disability had no relationship to his past coal dust exposure, and explained the medical basis for this opinion in terms of the x-ray and CT scans, the reduction in Claimant's diffusion capacity, and the pulmonary function study values.

As noted in the doctors' reports, the record also contains three interpretations of a CT scan done in February of 2000. (EX 2; EX 3; EX 4). These interpretations by Drs. Paul Wheeler, William Scott, Jr., and John C. Scaterige, all indicate no evidence of pneumoconiosis. Further, these physicians, who are all B-readers and board-certified radiologists, found evidence of emphysema.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. To establish entitlement to benefits under this part of the regulations, a claimant must prove by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. § 725.202(d); *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). In *Director, OWCP v. Greenwich Collieries, et al.*, 114 S. Ct. 2251 (1994), the U.S. Supreme Court stated that where the evidence is equally probative, the claimant necessarily fails to satisfy his burden of proving the existence of pneumoconiosis by a preponderance of the evidence.

Pneumoconiosis and Causation

Under the Act, "'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. In evaluating the x-ray evidence, I assign heightened weight to interpretations of physicians who qualify as either a board-certified radiologist or "B" reader. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). I assign greatest weight to interpretations of physicians with both of these qualifications. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984).

The evidence of record contains six interpretations of three chest x-rays. The reading by Dr. Navani of the May 20, 2001 x-ray is a quality-only reading, with Dr. Navani assigning this x-

ray the highest possible rating of "1." The x-ray taken May 29, 2001 was interpreted as negative by two highly-qualified readers, Drs. Patel and Wheeler, both dually-qualified physicians. Dr. Alexander, also a B-reader and board-certified radiologist, interpreted this same x-ray as positive for pneumoconiosis. Two B-readers interpreted the two most recent x-rays as negative for the disease.

Assigning the greatest probative weight to the readings by the dually-qualified physicians and weighing the x-ray evidence together, I find that the weight of this evidence does not establish the existence of pneumoconiosis under § 718.202(a)(1). Of all the interpretations, only one, albeit by a dually-qualified reader, found the x-ray evidence positive. Therefore, I find Claimant has failed to meet his burden of proving pneumoconiosis under this section.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy evidence. This section is inapplicable to this claim because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions apply to this claim, Claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides that a claimant may establish the presence of pneumoconiosis through a reasoned medical opinion. Although the x-ray evidence does not establish pneumoconiosis, a physician's reasoned opinion nevertheless may support the presence of the disease if it is explained by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986).

Dr. Rasmussen and Dr. Robinette diagnosed coal workers' pneumoconiosis, while Dr. Fino and Dr. Castle found no evidence of the disease. Dr. Rasmussen found "legal" pneumoconiosis in that he attributed Claimant's lung disease at least in part to his past coal mine dust exposure. However, this physician provided little or no explanation for his opinion. Likewise, Dr. Robinette listed coal workers' pneumoconiosis throughout his progress notes documenting Claimant's visits, but never provided an explanation for this diagnosis other than to refer to a letter that Claimant brought to Dr. Robinette stating that another doctor had found the existence of the disease and his references to interpretations of x-rays by other physicians. In 2000, Dr. Robinette reviewed CT scans done as part of a black lung evaluation, but he failed to address the fact that the physicians who interpreted those scans did not mention the existence of pneumoconiosis. In 2002, Dr. Robinette noted "complicated" pneumoconiosis, but did not provide a basis for his finding. In 2005, more CT scans were ordered, but these scans, once again, revealed no evidence of interstitial lung disease. Dr. Robinette did not explain why these scans were inconsistent with his diagnosis. Nevertheless, this physician listed pneumoconiosis and interstitial lung disease in his July 2005 report. The record does not contain the credentials of either Dr. Robinette or Dr. Rasmussen.

In contrast, Dr. Fino and Dr. Castle provided detailed explanations and references to objective tests supporting their opinion that Claimant does not have legal or clinical coal workers' pneumoconiosis. After examining Claimant, personally, Dr. Castle also reviewed all other opinions and medical documentation of record, which information did not change his original opinion. Dr. Fino reviewed all other objective evidence of record, as well. I find these two reports more comprehensive and well-documented, so that the reports of Drs. Fino and Castle deserve greater probative weight. *See Church v. Eastern Assoc. Coal Corp.*, 20 B.L.F. 1-8 (1996), *aff'd in relevant part on recon.*, 12 B.L.R. 1-51 (1997); *Scott v. Mason Coal Co.,* 14 BLR 1-37 (1990) (en banc recon.); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Sabett v. Director, OWCP*, 7 B.L.R. 1-299 (1984). Moreover, I assign greater weight to the opinions of Drs. Fino and Castle because of their credentials and expertise in the area of pulmonary disease. *Burns v. Director, OWCP*, 7 BLR 1-597 (1984). Dr. Fino and Dr. Castle both referred to objective tests, studies and symptoms supporting their firm belief that Claimant's severe pulmonary condition had arisen out of his tobacco abuse and asthmatic component and was not related to his past exposure to coal dust. The other medical evidence, hospitalization reports by other physicians, as well as CT scans of record also support the opinions of these two specialists.

While treating physicians, such as Dr. Robinette, may be afforded greater probative weight, this evidentiary rule cannot be applied mechanically. Specifically, the amended regulations delineate that an adjudicator may assign substantial weight to a treating physician's opinion according to the "credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." In other words, a treating physician's opinion must still be well-reasoned and documented and may be weighed along with other medical opinions by doctors with more comprehensive reports and whose credentials exceed those of the treating physician. Therefore, I assign greater probative weight to the opinions of Drs. Fino and Castle over the opinions of Drs. Robinette and Rasmussen and find that Claimant has not met his burden of establishing pneumoconiosis under § 718.202(a)(4) of the regulations.

In summary, Claimant has not established the existence of pneumoconiosis under any of the application sections of Part 718.

Because Claimant established over ten years of coal mine employment, he would be entitled to a rebuttable presumption that his pneumoconiosis arose from coal mine employment had he established the existence of that disease. *See* 20 C.F.R. § 718.203(b).

Total Disability Due to Pneumoconiosis

Even if Claimant could establish the presence of pneumoconiosis, he still has the burden of showing that he is totally disabled by pneumoconiosis before being entitled to benefits. A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(b) provides several criteria

for establishing total disability. Under this section, I first must evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike, to determine whether Claimant has established total respiratory disability. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(b)(2)(i) and (ii), total disability may be established with qualifying pulmonary function studies or arterial blood gas studies. A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i), (ii). A "non-qualifying" test produces results that exceed the table values. Out of the eight pulmonary function tests of record, all of them were qualifying under the regulations. Thus, the weight of the pulmonary function study evidence supports a finding of total disability under § 718.204(b)(2)(i).

Of the four blood gas studies designated by the parties as evidence, the two tests conducted in 2001 were qualifying. However, the tests conducted in 2002 and 2005 were not qualifying. Therefore, this evidence is in equipoise and does not necessarily support a finding that Claimant is totally disabled pursuant to § 718.204(b)(2)(ii).

Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Under § 718.204(b)(2)(iv), total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work. All of the physicians of record agreed that Claimant was disabled, from a pulmonary standpoint, from returning to his former coal mine work. Therefore, the medical opinion evidence is in favor of finding total disability under § 718.204(b)(2)(iv). In sum, all of the pulmonary function studies were qualifying, the blood gas study evidence is in equipoise as to whether Claimant is disabled, and the medical opinions weigh in favor of finding that Claimant has a totally disabling respiratory impairment. Considering all this evidence together, I conclude that Claimant has established that he is totally disabled under 20 C.F.R. § 718.204(b).

Nevertheless, Claimant must also establish that his total disability is due to pneumoconiosis by establishing that pneumoconiosis is a "substantially contributing cause" of his pulmonary impairment. 20 C.F.R. § 718.204(c). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it: (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. *Id.* Claimant can only demonstrate the cause of his total disability by means of a physician's documented and well reasoned medical report. 20 C.F.R. § 718.204(c)(2).

Dr. Rasmussen believed that Claimant's coal dust exposure was a "significant contributing factor" to his impairment, but as noted above, provided no explanation or basis for

this opinion. Dr. Robinette acknowledged Claimant's lengthy smoking history as a principal factor leading to his pulmonary disease, but believed Claimant's "coal dust reticulation and emphysematous change additionally contributed to his impaired diffusion capacity." However, Dr. Robinette provided no explanation for this opinion other than his lengthy treatment of Claimant's current pulmonary problems.

Drs. Fino and Castle both provided detailed reports and well-reasoned explanations for their opinions that the miner's pulmonary impairment was not related to his past exposure to coal dust. For the same reasons provided above, I assign greater probative weight to these two opinions. Thus, the weight of the medical evidence does not support Claimant's burden of showing that pneumoconiosis is a substantially contributing cause to his respiratory disability under § 718.204(c)(1).

Conclusion

In sum, I find that Claimant has not established the existence of pneumoconiosis or shown that his pulmonary disability is due to pneumoconiosis. Therefore, this claim must be denied.

ORDER

The claim of B.J. for benefits under the Act is hereby **DENIED**.

A

Stephen L. Purcell
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. A copy of this Notice of Appeal also must be served on Allen Feldman, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.